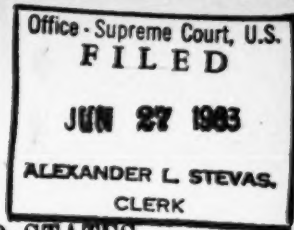


82 - 2136



No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

FREZZO BROTHERS, INC.
GUIDO FREZZO and JAMES L. FREZZO,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where a Section 2255 petitioner shows that he was ineffectively represented at trial because his counsel did not present evidence of a defense that should have been submitted to the jury, may the habeas court resolve the issue against him by constituting itself the factfinder and rendering a verdict against such petitioner on conflicting evidence under circumstances in which the basis for the adverse verdict was never litigated at trial?

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FREZZO BROTHERS, INC.,
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v.

UNITED STATES OF AMERICA,
Respondent

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

Petitioners, Frezzo Brothers, Inc., Guido Frezzo and James L. Frezzo, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed their judgment of conviction entered upon a jury verdict of guilt.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioners, Frezzo Brothers, Inc., Guido Frezzo and James L. Frezzo, seek a Writ of Certiorari to review the judgment (App. F)* rendered by the United States Court of Appeals for the Third Circuit on March 29, 1983. The judgment affirmed petitioners' criminal convictions entered in the United States District Court for the Eastern District of Pennsylvania following a jury trial (App. A).

By Order dated May 20, 1983, Mr. Justice Brennan extended the time to file a Petition for Writ of Certiorari to and including June 27, 1983 (App. G).

The Supreme Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

* App. refers to the appendix annexed to this petition in a separate booklet.

**PERTINENT STATUTES, RULES AND
CONSTITUTIONAL PROVISIONS**

The following constitutional provision set forth in the Appendix is pertinent: the Fifth Amendment to the United States Constitution. (App. H)

The following statutes set forth in the Appendix are pertinent: 33 U.S.C. § 1311(a) and § 1319(c). (App. I)

The following regulation set forth in the Appendix is pertinent: 40 C.F.R. § 125.4(i). (App. J)

STATEMENT OF THE CASE

A. *Procedural History*

Petitioners were convicted of negligent and willful discharge of pollutants into navigable waters in violation of the permit requirements of Section 402(a) of the Water Pollution Control Act Amendments of 1972. 33 U.S.C. Section 1311(a) and Section 1319(c). 461 F.Supp. 266 (E.D. Pa. 1978) (App. A), *aff'd*, 602 F.2d 1123 (1979) (App. B).

Petitioners' new counsel raised for the first time on petition for rehearing in the Court of Appeals the agricultural exclusion of 40 C.F.R. Section 125.4(i). This was denied. The District Court there dismissed their post-conviction petitions without a hearing. Its opinion is reported at 491 F.Supp. 1339 (E.D. Pa. 1980) (App. C). The Court of Appeals reversed, holding that if petitioners' discharges were agricultural pollution then petitioners needed no Section 402 permit. 642 F.2d 59 (3rd Cir. 1981) (App. D). The Court of Appeals remanded for the District Court to hear evidence and decide this issue.

The District Court took testimony and found against petitioners. 546 F.Supp. 713 (E.D. Pa. 1982) (App. E). The Court of Appeals affirmed *per curiam*. No. 82-1494 (March 8, 1983) (3rd Cir. 1983) (App. F).

B. *Concise Statement of Facts*

At the time of petitioners' alleged violations in 1977 and 1978, there were in effect EPA regulations which provided (40 C.F.R. Section 125.4(i)) that discharge of surface water into navigable streams from agricultural activities did not constitute "point source" discharge and therefore did not require a Section 402 permit. This "agricultural activities" defense was not raised at trial or on direct appeal.

Petitioners' new counsel raised for the first time on petition for rehearing in the Court of Appeals the agricultural exclusion of 40 C.F.R. Section 125.4 (i). This petition was denied and petitioners then filed a petition

to vacate their sentences under 28 U.S.C. Section 2255 as to the individual defendants and a petition for coram nobis on behalf of the petitioner corporation. The Government moved to dismiss the post-trial petitions arguing that even if petitioners' activities were agricultural within the meaning of the cited regulation, they were not entitled to habeas relief. The District Court agreed and dismissed the petition. (App. C)

The Court of Appeals reversed, stating: "[w]e hold that, if petitioners' discharges were agricultural pollution, then petitioners needed no Section 402 permit under the language in the former regulation." 642 F.2d at 63 (App. D).

The Court of Appeals also held that whether the pollution was agricultural was an issue of fact and remanded for the District Court to hear evidence and decide this factual issue. On remand, the District Court heard evidence, including two unquestioned experts on the subject produced by petitioners who stated that the process known as mushroom compost production was agricultural in its materials, its processes and its purposes as well as in its history and its historic legal recognition by state and federal agencies concerned. The District Court held that petitioners' mushroom composting activity was manufacturing rather than agricultural activity. Having so determined, the District Court, addressing the merits of the Section 2255 — coram nobis petitions, held that petitioners' trial counsel was not ineffective in not having raised the agricultural issue because the petitioners' activities were truly manufacturing.

The District Court relied in large part on the fact that no objection was made at trial to its definition (in the charge) of pollutants as including agricultural waste, overlooking the fact that at trial all parties agreed that they were dealing with agriculture.

Petitioners appealed, arguing that it does not cure the failure to present their defense to the jury for the habeas court to find on conflicting evidence that the defense lacked merit factually. The Court of Appeals affirmed per curiam. (App. F)

REASONS FOR GRANTING THE WRIT

This Court's Rule 17 considerations here applicable are that the District Court and Court of Appeals have so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and have decided a previously undecided federal criminal procedural question in a way that conflicts with decisions of this Court in closely analogous situations.

We see the action of the Court below as at variance with the rule of *Dunn vs. United States*, 442 U.S. 100, 106 (1979) wherein this Court reversed the Tenth Circuit's affirmance of a perjury conviction on a charge "that was neither alleged in an indictment nor presented to a jury at trial." As applied to affirmance on direct appeal, this rule is a fundamental to due process jurisprudence. Cf. *Rewis vs. United States*, 401 U.S. 808 (1971); *Chiarella vs. United States*, 445 U.S. 222 (1980).

Petitioners believe and have consistently argued to the courts below that the same rule is applicable in this Section 2255 review of a criminal conviction. So viewed, the record presents a question which this Court has not squarely addressed but which is closely analogous to the direct appeal problem. The Third Circuit decision departs from the doctrine established in that context.

In Section 2255 proceedings, persons convicted in federal courts ask the habeas court to review the earlier record in a constitutional frame. Section 2255 is not designed to provide a vehicle for retrial of trial issues, whether or not they were earlier presented, and such proceedings certainly are not designed to permit judging the fairness of an earlier criminal proceeding by trial to a court of a previously unlitigated issue which petitioners contend should have been raised by their counsel and submitted to the jury in their trial.

Concededly, it is a Section 2255 petitioners' burden to show he has a jury issue. However, a petitioner need not prove his defense to a habeas judge.

These petitioners contended they were deprived of a chance to submit the agricultural defense to the jury by

the ineffectiveness of their counsel. In the post-conviction proceedings, the courts have actually tried the agricultural issue and found against petitioners on it and therefore held that the issue need not have been presented to the jury in the first place. The judgement against petitioners results from a finding of fact based upon conflicting evidence first submitted in the remand hearing before the District Court.

Such conduct of a Section 2255 proceeding totally distorts the nature of such a proceeding. These petitioners undertook the burden of showing a serious error *at their trial* that worked to their actual and substantial disadvantage infecting that trial with error of constitutional dimension. Cf. *United States vs. Frady*, 456 U.S. 152 (1982). The error lay in their counsel's failure to present what appears to have been their only viable defense, i.e., that their activity was agricultural in nature within the EPA regulations excluding such activity from the permit program.

This record clearly presents the issue petitioners seek to have reviewed by this Court; namely, whether a habeas court under Section 2255 may deny relief by a factual finding of a jury issue never presented at trial.

ARGUMENT

PETITIONERS' RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED IN THE SECTION 2255 POST- CONVICTION PROCEEDINGS BY THE SUSTAIN- ING OF PETITIONERS' CONVICTIONS ON A BA- SIS OTHER THAN THE BASIS ON WHICH THE JURY RENDERED ITS VERDICT.

Fundamental precepts of due process of law teach that a conviction may not be affirmed on a basis other than that on which the jury rendered its verdict. *Chiarella vs. United States*, 445 U.S. 222, 236 (1980); *Dunn vs. United States*, 442 U.S. 100, 106 (1979); *Rewis v. United States*, 401 U.S. 808, 814 (1971).

Here, at trial, the Government argued that petitioners' pollution was agricultural waste. At the Government's request, the trial judge instructed the jury that the case involved agricultural waste. The district judge instructed the jury that the term "pollutant" includes:

[d]redged soil, solid waste, incinerator residue, sewerage garbage, sewerage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and *agricultural waste* discharged into the water. (emphasis added)

The district judge then narrowed it down for the jury stating: "I also want to call your attention to the fact that the pollutant definition includes the term agricultural waste. That is one of the pollutants specifically mentioned in the definition of pollutant."

In arguing the Government's case to the jury, the Assistant United States Attorney predicted to the jury that the Court would read them the statutory definition of pollutant, adding: "[t]hat it can be biological materials, that it can be agricultural waste. And we think, ladies and gentlemen, that there is ample evidence that

compost material is biological material; that it's sewage; that it's agricultural waste." Of all the types of pollutants defined by the Court, the Government chose to argue agricultural waste.

Having tried petitioners as agricultural polluters, the Government in Section 2255 proceedings argued that they were manufacturers when new defense counsel discovered the agricultural exclusion. Thus, the Government sought to have the conviction affirmed on a theory not presented to the jury.

This Court has consistently declined to permit convictions to be sustained on a basis or theory other than the one on which the jury rendered its verdict. In *Chiarella vs. United States, supra*, petitioner was convicted because of his failure to disclose material, non-public information to sellers from whom he bought the stock of target corporations. In seeking to support the petitioner's conviction, the Government argued that the petitioner breached a duty to the acquiring corporation, as well. This Court held:

[t]he jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. Because we cannot affirm a criminal conviction on the basis of a theory not presented to the jury, we will not speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of Section 10 (b). (citations omitted) *Chiarella*, 445 U.S. at 236-237.

In *Dunn vs. United States, supra*, the petitioner had been convicted under 18 U.S.C. Section 1623 for making a false declaration "in a proceeding ancillary to any court or grand jury" based upon a statement under oath made in the office of a private attorney. The Tenth Circuit affirmed petitioner's conviction although it agreed with the petitioner that the interview in a lawyer's office was not within Section 1623. The Court of Appeals held instead that a hearing in court a month after the disposition was within the statute. This Court reversed, hold-

ing: "[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial, offends the most basic notions of due process." *Dunn*, 422 U.S. at 106.

In *Rewis vs. United States*, *supra*, petitioners were convicted under 18 U.S.C. Section 1952, which prohibits interstate travel in furtherance of certain criminal activity, under jury instructions that petitioners violated the Travel Act if they traveled interstate for the purpose of gambling. On appeal, the Government offered an alternative construction of the Travel Act — that the act of encouragement of interstate patronage violates the statute. This Court held that "the Government's proposed interpretation of the Travel Act cannot be employed to uphold these convictions . . . because it is not the interpretation of Section 1952 under which petitioners were convicted." *Rewis*, 401 U.S. at 814.

This case is indistinguishable in principle from those in which this Court has reversed convictions that had been affirmed on direct appeal on theories not presented to the jury.

In addition, to uphold a conviction on a charge not presented to a jury offends "a defendant's right to be heard on the specific charges of which he is accused." *Dunn*, 442 U.S. at 106 (citations omitted).

The Court of Appeals has here held that whether the pollution was agricultural was an issue of fact and remanded for the District Court to hear evidence and decide this factual issue. In doing so, the Court of Appeals recognized that it could not determine issues of fact. It erred in permitting a district judge to do so. The constitutional guarantee of factual findings on a contested element of the offense or of a defense as the exclusive province of a jury is elemental. Findings of fact have never been held to be appropriately made in such a post-trial setting. *Cf. Dunn, supra; Eaton vs. Tulsa*, 415 U.S. 697, 698-99 (1974); *Garner vs. Louisiana*, 368 U.S. 157, 163-64 (1961); *Cole vs. Arkansas*, 333 U.S. 196, 201 (1948); *De Jonge vs. Oregon*, 299 U.S. 353, 362 (1937).

Petitioners' argument that they had been deprived, by ineffective counsel, of the opportunity to present to the jury at their trial the only defense available to them was inappropriately met by the District Court with the response that it had found as a fact that "the Frezzo Brothers, in connection with their production of compost, are engaging in a manufacturing activity and not an agricultural operation." 546 F.Supp. at 724. From this factual finding, the District Court drew the conclusions (1) that the agricultural activity exclusion of the EPA regulations did not apply to petitioners and (2) therefore they were not ineffectively represented at trial by their former counsel who did not raise this defense and (3) they were not prejudiced because the defense was without merit. All of these conclusions were said to follow from the factual finding on conflicting evidence presented only in the Section 2255 remand hearing and never presented at trial.

The District Court recognized that petitioners' contention was not quite so simple as agricultural *vel non*. The District Court observed: "[d]efendants also contend they will be prejudiced if this court finds that compost making is not an agricultural activity on the ground that this case was tried to the jury on the theory that the Frezzo Brothers' operation produces agricultural waste." 546 F.Supp. at 725.

The Court then digressed from the point, stating that no objection was made at trial to its definition (in the charge) of pollutants as including agricultural waste. In fact, all parties at trial were satisfied to regard petitioners' activities as agricultural until it appeared that label might exculpate them. Agriculture was not a contested issue at trial. The habeas judge entirely ignored the point that it does not remedy the failure to present their defense to the jury for the Court to become a jury and find on conflicting evidence in a Section 2255 hearing that the defense lacked merit factually. Petitioners' position was and is that this was a jury issue.

The result of the Third Circuit's approval of the District Court decision in this case is to convert post-conviction proceedings into a thirteenth juror type of review in which a conviction may be upheld on a basis never litigated before the jury.

While review of criminal convictions in Section 2255 and coram nobis proceedings is substantially narrower than on direct appeal, *United States vs. Frady, supra*, the error alleged in this proceeding is reviewable in both types of proceedings. Both on direct appeal (if the record suffices) and on Section 2255 proceedings later, where a criminal defendant has been deprived of his day in court by counsel's failure to investigate, research and assert his only viable defense, which presents at least a colorable jury issue, the reviewing court cannot solve the problem presented by constituting itself the jury, hearing conflicting testimony and deciding the jury issue against the petitioner. This "thirteenth juror" method of review is improper in Section 2255 proceedings and effects the same deprivation of due process as does affirmance on direct appeal upon a ground not submitted to the jury. Cf. *Chiarella, supra*; *Dunn, supra*; *Rewis, supra*.

There are many factual determinations to be made in §2255 proceedings. But they are factual determinations subsidiary to deciding whether the earlier trial proceedings conformed to the Constitution and laws of the United States. They will not be jury issues that were not presented to the jury. Petitioners submit that the question we have described warrants this Court's attention as a supervisory matter and is one affecting a basic issue of federal criminal procedure. Petitioners likewise believe that although not squarely decided by this Court and therefore to some extent a novel issue, nevertheless, the decisions below depart from clearly applicable precedent of this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully Submitted,

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